No. 85-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO

Petitioner,

v.

JOHN LEROY SPRING

Respondent.

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CASES CITED

QUESTION PRESENTED FOR REVIEW

Whether the Colorado Supreme Court correctly applied the applicable law in determining that under the totality of the circumstances the prosecution had not met its burden of proof that Mr. Spring had validly waived his rights prior to interrogation?

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STATEMENT OF THE FACTS

On March 30, 1979, Respondent, John Spring, was arrested by federal Alcohol, Tobacco and Firearms agents during a firearms transaction in Kansas City, Missouri. At that time, the federal agents had been told by George Dennison, the informant who had arranged the firearms transaction, that Mr. Spring might have been involved in a homicide in Craig, Colorado.

While Mr. Spring was incarcerated in Missouri, he was interrogated on three separate occasions with regard to the Colorado homicide, twice by federal ATF agents, and once by Colorado authorities. The Colorado Supreme Court found that both of the ATF statements were unconstitutionally obtained, and remanded the third statement to the District Court for a hearing on attenuation.

The circumstances of those three interrrogations were as follows:

A. Statement of March 30, 1979.

On March 30, 1979, Mr. Spring and Robert Beam were arrested by federal ATF agents for interstate transportation of stolen firearms and related offenses. The arrest was made during an actual hand-to-hand sale of weapons to federal agents, which had been set up in part by informant George Dennison. Dennison had previously informed the federal agents that Mr. Spring and a man named

Donald Wagner had told him of their involvement in the death of Donald Alan Walker in Colorado. After the weapons were seized and Spring and Beam arrested, Mr. Spring was placed in the back seat of an ATF vehicle and advised of his rights. Later, at the ATF office, Mr. Spring was "processed," (fingerprinted, photographed, etc.), then readvised and questioned by agents Wactor and Patterson, two of the agents who had been present at his arrest. The agents began by asking Spring about the stolen firearms from Iowa that had led to his arrest and federal charges. Later in the interrogation, without informing Mr. Spring of their intent to question him about the Colorado homicide, they began asking him about that matter. First, he was asked if he had a criminal record. He admitted that he had a juvenile murder record for shooting his aunt when he was ten years old. The agent then asked Spring if he had ever shot anyone else. He responded that he had "shot another guy once." Then he was asked if he had ever been to Colorado, and he said no. The agent then asked him if he had shot Donald Walker in Colorado and thrown him into a snowdrift, to which he again responded, "no." (Transcript, Volume 2: Suppression Hearing)

Based on the totality of the circumstances, the Colorado Supreme Court found that this statement was not shown to have been obtained pursuant to a valid waiver of Mr. Spring's constitutional rights.

B. Statement of May 26, 1979.

On May 26, 1979, Mr. Spring was interviewed at the Jackson County Jail in Kansas City, Missouri, by Detective James Curtis of the Moffat County, Colorado Sheriff's department, and by Agent Leo Konkel of the Colorado Bureau of Investigation. The purpose of the interview was to obtain information about the death of Donald Walker from Mr. Spring, who was a suspect in the case. At the suppression hearing, Detective Curtis stated that he and Konkel had previously been informed of the results of the March 30 interrogation of Mr. Spring by ATF agents. Agent Konkel testified that he first told Mr. Spring not to talk, but just to listen carefully. He told Mr. Spring that he was a suspect, and also told him what they had learned about the case from their investigation that had led to his being a suspect. He then advised Mr. Spring of his rights, and Mr. Spring agreed to talk. (Transcript, Volume 2: Suppression Hearing).

The Colorado Supreme Court remanded the case to the District Court with instructions that prior to the retrial of the case, the court should resolve the question of whether the taint of the March 30 statement was sufficiently attenuated to make this statement admissible.

C. Statement of July 13, 1979.

The same interrogation technique used by the ATF agents on March 30 was used again on July 13. Federal ATF agents Wactor and Patterson again visited Mr. Spring at the jail after he had entered his guilty plea on the federal firearms charge. Their purported reason for the July 13 interview was to obtain information about the whereabouts of additional firearms and explosives that they had learned might still be hidden in Iowa. When they advised Spring and began the interview, they did not tell Mr. Spring that he would be questioned about the Walker homicide. When Spring was advised of his rights, he stated that he would not sign anything without his lawyer, but he would talk with the agents. The questioning initially involved guns the agents thought might be hidden in a pond and a cave in Iowa. Questions about other related subjects, such as firearms fences in the Kansas City area, were also asked. The purpose of the interview was not to obtain information to support additional firearms charges against Spring, but merely to clear up the firearms matter, and to perhaps return some firearms to their owners and disarm potentially dangerous explosives. During the interview, Mr. Spring willingly answered questions about firearms and explosives, and about some other matters. He was asked about the .22 pistol he had been carrying when he was arrested, and he replied that it was Don Walker's gun. However, when asked if he had taken the gun off Walker's body, he responded, "I'd rather not talk about that." Later, he was asked if he had shot Walker, and he again stated, "I'd rather not talk about that." And then, when asked if it was Wagner who had shot Walker, he replied yet again, "I'd rather not talk about that." The two agents who testified at the suppression hearing gave conflicting testimony on the way the questioning had been conducted, one stating that when Spring had indicated an unwillingness to talk about Walker's death, they had turned temporarily to other subjects unrelated to the homicide, and then eventually returned to the homicide. However, the other agent testified that once they began asking about the Walker homicide they stayed generally with that topic. At any rate, during the course of that

interview, the agents ultimately did obtain several statements relating to the homicide. As the Colorado Supreme Court observed, because the interview was not taped or recorded in any way, the only record of it was Agent Wactor's brief notes and the agents' memories. Thus, it is not possible to tell where in the interview and in what sequence the questions relating to the Walker case were asked, and what responses Mr. Spring actually made to those questions. The record also fails to reveal what, if any, unrelated questions were asked in between questions concerning the death of Walker. (Transcript, Volume 2: Suppression Hearing).

As to this statement, like the March 30 statement, the Supreme Court found that based on the totality of the circumstances a valid waiver of Mr. Spring's constitutional rights had not been shown.

ARGUMENT

THE COLORADO SUPREME COURT CORRECTLY APPLIED THE APPLICABLE LAW IN DETERMINING THAT UNDER THE TOTALITY OF THE CIRCUMSTANCES THE PROSECUTION HAD NOT MET ITS BURDEN OF PROOF THAT MR. SPRING HAD VALIDLY WAIVED HIS RIGHTS PRIOR TO INTERROGATION.

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that suspects in custodial interrogation must be informed of their fifth and sixth amendment rights to remain silent and to be represented by counsel. Any waiver of these rights must be knowing, intelligent and voluntary, and must be made with an understanding of the consequences of waiving the rights. "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." Id., at 469. The validity of a waiver is determined on the basis of the "totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." Fare v. Michael C., 442 U.S. 707, 725 (1979), citing Miranda v. Arizona, supra, 384 U.S. at 475-77. In Johnson v. Zerbst, 304 U.S. 458 (1938), this Court announced guidelines for determining the validity of a waiver, based on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused," Id., at 464; and in Moran v. Burbine, ___ U.S. ___, No. 84-1485 (U.S. March 10, 1986), this Court stated:

> The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. (citations omitted)

In this case, the Colorado Supreme Court reviewed three statements made by Respondent, John Spring, and correctly determined that, under the totality of the circumstances surrounding the interrogations, two were inadmissible and the

third required a remand for a finding on attenuation. The record supports the Court's finding that the prosecution had failed to show that Mr. Spring's statements to federal Alcohol, Tobacco and Firearms officers concerning a Colorado homicide were the product of a "knowing, intelligent and voluntary" waiver of his rights.

A. Statement of March 30, 1979.

Contrary to the Colorado Attorney General's suggestions in its formulation of the questions presented, the Colorado Supreme Court did not hold that a valid waiver of rights requires "that the defendant be aware, prior to interrogation, of all of the possible subjects of interrogation." (Petition, Issues Presented for Review) To the contrary, the Court expressly rejected the holding of the Colorado Court of Appeals that such awareness was a prerequisiste to a valid waiver. The Court stated:

> [T]he validity of Spring's waiver of constitutional rights must be determined upon an examination of the totality of the circumstances surrounding the making of the statement to determine if the waiver was voluntary, knowing and intelligent. No one factor is always determinative in that analysis. Whether, and to what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances, although it may be a major or even a determinative factor in some situations.

People v. Spring, 713 P.2d 865 (Colo. 1985) (emphasis added; citations omitted)

The Court indicated that "it is important to determine whether the questions were related to crimes or general subject matter about which the suspect anticipated interrogation, or whether the police led him to believe that he would be questioned about one crime but then interrogated him about a totally unrelated offense." Id., at 713 P.2d 873.

The Court then reviewed the relevant circumstances surrounding the interrogation. After first noting the failure to advise Mr. Spring that he would be questioned about the Colorado homicide, the Court listed several factors which were strongly suggestive of a deliberate intent to mislead Mr. Spring about the subject matter of the interrogation:

> Here, the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, are

determinative factors in undermining the validity of the waiver. The ATF agents did not advise Spring that a part of their interrogation would include questions about the Colorado homicide prior to Spring's decision to waive his constitutional rights and to answer questions. Spring had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction that allegedly violated federal law would question him about a murder that occurred in Colorado, a crime not only in a distant jurisdiction but also outside of the normal purview of the federal Bureau of Alcohol, Tobacco and Firearms and totally unrelated to the transaction that gave rise to the arrest and interrogation. Moreover, the federal crime that occasioned the interrogation, and about which Spring was cognizant when he signed the written waiver and agreed to answer questions, represented a relatively less serious matter than first degree murder.

Id., at 713 P.2d 874. (emphasis in original)

The Court then noted that the record revealed little concerning Mr. Spring's intelligence or acquaintance with the criminal justice system, also relevant factors under Johnson v. Zerbst, supra. In summary, the Court found,

> Given these facts, it cannot be said that the prosecution carried its burden of proving by clear and convincing evidence that Spring made a voluntary, knowing and intelligent decision to forego counsel and to answer questions concerning the murder.

Id., at 713 P.2d 874.

The foregoing reveals a careful and thorough analysis of the totality of the circumstances, as is required in waiver-challenge cases. Fare v. Michael C., supra,; Johnson v. Zerbst, supra. In a subsequent case, People v. Jones, No. 83SC414 (Colo. Jan. 13, 1986), the Colorado Supreme Court has clarified its application of the totality of circumstances test. In the Jones case, the defendant had used the name of Angel Santiago in reporting to New Hampshire authorities that his car had been stolen. Investigation revealed that Angel Santiago's car had already been reported stolen, after his murdered body had been found in Colorado. The man representing himself as Mr. Santiago was then questioned about both the car and the Colorado homicide. The Colorado Supreme Court stated:

> This is unlike the factual scenario in Spring. The federal agents in Spring began questioning the defendant about firearms charges and then asked about an unrelated homicide.... While the defendant in Spring had no reason to believe that the federal agents who questioned him about federal charges would also inquire about a Colorado homicide, the defendant here could have reasonably expected to be asked about the circumstances surrounding his ownership and possession of the car he had reported stolen. In our view, the defendant was adequately advised of the subject matter of the interview at the time he waived his Miranda rights.

People v. Jones, Id., Slip Opinion at 14. (Appendix A)

The distinction drawn by the Colorado Supreme Court between its Spring and Jones decisions demonstrates that the Court is, in fact, properly applying the appropriate totality of circumstances test to the facts of each particular case in determining the validity of challenged waivers.

B. Statement of May 26, 1979.

Having found the March 30 statement unconstitutional, the Colorado Supreme Court remanded the case for a finding of attenuation as to the May 26, 1979 statement. Since the District Court has not yet heard that matter, the question is not ripe for review by this Court. The Colorado Attorney General's suggestion that this Court should find the statement admissible without regard to attenuation under Oregon v. Elstad, ___ U.S. ___, 105 S.Ct. 1285, 84 L.Ed.2d 230 (1985), reflects a misinterpretation of the Elstad decision. That case only applies to a "simple failure to administer Miranda warnings," absent "any coercion or improper tactics," in which instance a finding of attenuation may be unnecessary. Id., 84 L.Ed.2d at 230, 232. This case obviously involves more than a "simple" Miranda violation, in light of the tactics employed to obtain Mr. Spring's alleged waiver. Thus, the presumption of taint, and the necessity for an inquiry into attenuation, remains.

C. Statement of July 13, 1979.

The Colorado Attorney General suggests in the statement of questions presented that the correctness of the Colorado Supreme Court's ruling that this statement was inadmissible depends on whether the police have a duty to stop interrogation and redetermine the scope of the suspect's waiver when the suspect "refuses to answer a particular question." (Petition, Issues Presented for Review) The Colorado Supreme Court's review of the totality of the circumstances reveals that, in fact, the statement was unconstitutional for the same reasons that the March 30 statement was unconstitutional, with several additional factors making that conclusion even more unavoidable.

As with the March 30 statement, the Court analyzed the totality of the circumstances under which the July 13 statement was made. At the outset of its analysis, the Court observed that this interview, like that first one, was conducted

by ATF agents. It was conducted after Mr. Spring had entered his guilty plea on the firearms charge, and,

> the trial court found that the primary purpose of conducting this interview, a purpose apparently made known to Spring at the outset, was to obtain information from him concerning the whereabouts of additional firearms and explosives. When the interview began, Spring was not told that he would be questioned about the Walker homicide.

People v. Spring, supra, 713 P.2d at 876.

Under this portion of the analysis alone, the statement would have had to have been suppressed. On July 13, having already pled guilty and been sentenced on the firearms charge, Mr. Spring had all the more reason to cooperate as much as possible with the ATF officials as to firearms and related topics. He had nothing to lose and could only gain by his cooperation, in terms of post-conviction treatment. Here, as before, when the agents approached and advised him, they gave him no indication of their intent to shift the interrogation to the Colorado homicide case. He was specifically not told that he would be asked about the homicide. However, as to this statement, the Court noted even more circumstances vitiating the alleged waiver:

> The interrogation apparently began with a wide-ranging discussion of the whereabouts of various firearms and explosives of which Spring might be aware, along with related subjects. As part of this discussion, Spring was asked where he had obtained a .22 caliber pistol that the agents had seized from him at the time of his arrest. Spring replied that it had been Walker's gun. Asked if he took the gun off Walker's body, Spring said, "I'd rather not talk about that." Later, the agents asked Spring if he had shot Walker and, subsequently, if Wagner had shot Walker. To both questions, Spring again replied, "I'd rather not talk about that."

Id., 713 P.2d at 876.

In finding the July 13 statement inadmissible, the Colorado Supreme Court reiterated its rejection of a per se rule that a suspect must be readvised before he is asked questions on a subject about which he was not informed before the interrogation. The Court did, however, call attention to the agents' refusal to honor what was apparently a repeated invocation of Mr. Spring's right to silence in response to questions about the homicide.

The Court acknowledged that a suspect could refuse to answer certain questions, yet voluntarily and intelligently answer others during an interrogation session without vitiating a valid waiver. However, the Court emphasized that the

prosecution bears a "heavy burden" to demonstrate that the waiver is voluntary, citing Miranda. Id., 713 P.2d at 878. The Court then went on to state that once the suspect has indicated that he does not wish to answer a question, the interrogators have a "duty to determine whether the suspect is in fact exercising his privilege against self-incrimination in all respects or is merely reluctant to answer particular questions." Id., 713 at P.2d 878.

In Michigan v. Mosley, 423 U.S. 96 (1976), this Court addressed the Miranda rule that, "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 423 U.S. at 100, quoting Miranda v. Arizona, supra, 384 U.S. at 473-74. In Mosley, this Court acknowledged the requirement that interrogation cease, and focused inquiry on when and under what circumstances the questioning could legitimately resume. This Court stated:

> To permit the continuation of custodial interrogation after momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned.

423 U.S. at 102. This Court concluded that the admissibility of statements obtained after a person has indicated a desire to remain silent depends on whether his "right to cut off questioning" was "scrupulously honored." 423 U.S. at 104, quoting Miranda v. Arizona, supra. This Court found the challenged statements to be admissible, noting that in that case, the suspect had stated that he did not wish to discuss a series of robberies, at which point questioning ceased and he was returned to his cell. Two hours later, he was questioned by a different officer at a different location, about an unrelated holdup-murder, after having been readvised of his Miranda rights. This Court emphasized that when the suspect declined to discuss the robberies, the police immediately ceased the interrogation, resumed questioning only after a significant period of time, and did not return to the subject of the robberies he had declined to discuss.

In the instant case, when Mr. Spring repeatedly declined to discuss the Walker homicide, the police never stopped the interrogation, but simply kept questioning Mr. Spring until they eventually obtained responses relating to the homicide. Under Mosley, to condone such tactics, "would clearly frustrate the

purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." 423 U.S. at 102.

In considering the circumstances surrounding the July 13 interrogation, the Colorado Supreme Court reviewed the record, noting that it contained no record of the interview itself, but only Agent Wactor's brief, hand-written notes and the inconsistent testimony of Agents Wactor and Patterson as to the manner in which the interogation was conducted. The Court then stated:

> [T]he evidence in the record, when viewed in the light of the totality of the circumstances and the requirements of Miranda v. Arizona, does not support the trial court's finding that Spring's July 13 statement was the result of a valid waiver of constitutional rights.

People v. Spring, supra, 713 P.2d at 877.

The Court then concluded:

> Here, there is no evidence that the ATF agents made any effort to reaffirm Spring's decision to waive his constitutional rights after he declined to answer particular questions. Nor did they make an effort to establish that by refusing to answer certain questions about the shooting of Walker, Spring did not intend to exercise his privilege against self-incrimination with regard to the entire subject from that point forward. They simply continued to interrogate Spring until they received answers to questions about the Walker homicide. Without a transcript or equivalent evidence showing the sequence and wording of the questions asked and Spring's answers, we cannot say that the evidence supports the district court's finding that Spring only exercised his right to remain silent "with respect to several specific questions," and that the waiver remained valid with respect to all of his answers to the other questions.

Id., 713 P.2d at 878.

Here, again, the Colorado Supreme Court properly applied the totality of the circumstances analysis to the facts surrounding the particular interrogation in question, and found that the statement obtained therein should have been suppressed.

CONCLUSION

In People v. Spring, 713 P.2d 865 (Colo. 1985), the Colorado Supreme Court has applied the appropriate totality of circumstances test in determining the admissibility of challenged statements. The Court's finding that the circumstances of two separate statements obtained by federal ATF agents failed to demonstrate a valid waiver of Mr. Spring's rights is consistent with the facts of this case, as

well as with the applicable decisions of this Court. Thus, this case presents no appropriate grounds for granting the State's Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I, Peggy O'Leary, counsel of record for John Leroy Spring, Respondent herein, certify that on April 15, 1986, I deposited in the United States Mails, postage prepaid, and properly addressed to the Mr. Joseph Spaniol, Jr., Clerk of the Supreme Court of the United States, Washington, D.C. 20593 the foregoing Brief in Opposition to Petition for Writ of Certiorari.

Peggy O'Leary #8498
PEGGY O'LEARY

CERTIFICATE OF SERVICE

I, Peggy O'Leary, counsel for record for John Leroy Spring, Respondent herein, certify that on April 15, 1986, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable John Milton Hutchins, First Assistant Attorney General of the State of Colorado, counsel for Petition, by depositing same in the United States Mails, postage prepaid, addressed as follows:

The Honorable John Milton Hutchins
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CERTIFICATE OF SERVICE

I, Peggy O'Leary, counsel for record for John Leroy Spring, Respondent herein, certify that on April 15, 1986, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable Maureen Phelan, Assistant Attorney General of the State of Colorado, counsel for Petition, by depositing same in the United States Mails, postage prepaid, addressed as follows:

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Public Defender Stamp

APPENDIX

SUPREME COURT, STATE OF COLORADO — January 13, 1986

No. 83SC401

NICHOLAS J. JONES, — Petitioner,
v.
THE PEOPLE OF THE STATE OF COLORADO, — Respondent.

No. 83SC414

THE PEOPLE OF THE STATE OF COLORADO, — Petitioner,
v.
NICHOLAS J. JONES, — Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED WITH DIRECTIONS

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JUSTICE ERICKSON delivered the Opinion of the Court.

Defendant, Nicholas J. Jones, was convicted of first-degree murder[1] and aggravated robbery[2] following a jury trial. In People v. Jones, 677 P.2d 383 (Colo. App. 1983), the court of appeals reversed the judgments of conviction and remanded the case for a new trial. We granted certiorari to review the decision of the court of appeals.[3] We affirm in part, reverse in part, and remand to the court of appeals with directions to reinstate the judgments of conviction against the defendant.

I.

On August 30, 1979, the body of Angel Santiago was found in Plateau Creek near Grand Junction, Colorado. He had been shot twice in the head. Santiago's wrists were tied behind his back, and his ankles were bound together. Santiago had left his home in Downey, California on August 23, driving a white 1973 Pontiac LeMans, en route to New York. A pathologist estimated Santiago's date of death between August 24 and August 26.

On September 7, at approximately 1:30 a.m., the defendant, accompanied by a male companion, checked into the Holiday Inn in Manchester, New Hampshire. The defendant registered under the name of Angel Santiago and used a VISA credit card bearing Santiago's name. Approximately one-half hour later, the defendant appeared in the hotel lobby and told the desk clerk that his companion had stolen his wallet, credit cards, money,

and car while he was taking a shower. Officer Eugene Cook of the Manchester Police Department was on routine patrol on the morning of September 7 and happened to walk into the Holiday Inn while the defendant was talking to the clerk. The clerk referred the defendant to Officer Cook, and the defendant, still identifying himself as Angel Santiago, reported the theft to Officer Cook. The defendant said that the car was a white 1973 Pontiac with a California registration. Officer Cook obtained the license plate number of the vehicle from the hotel registration card, and relayed the information to the police station. After talking with the defendant, Officer Cook returned to the police station and filed a written report. The vehicle information was entered on the police department's computer, and the police learned that the car had previously been reported stolen and was being sought in connection with a homicide in Colorado. The police then contacted Milo Vig of the Mesa County Sheriff's Department in Colorado. Vig said that his office was investigating the homicide of Angel Santiago and that the victim's car was missing.

Edmond LaBeouf, the Deputy Chief of Police of the Manchester Police Department, was apprised of the foregoing information when he reported for duty at 7:00 a.m. on the morning of September 7. He instructed Officer Cook and another officer to go to the Holiday Inn and ask the defendant to come to the police station to provide further information regarding

the stolen car. The officers were not told to arrest the defendant. The officers went to the hotel and knocked on the door of the room registered to the defendant. Receiving no answer, the officers asked a hotel employee to open the door. The door was chained from the inside, but the officers could see the defendant asleep on a bed. They called out to the defendant and, when he awoke, told him that questions had arisen about the car he had reported stolen and that the police wanted him to come to the station to provide further information. The defendant agreed to go to the station with the officers and was transported there in the officers' patrol car.

At the stationhouse, Officer Cook introduced the defendant to Deputy Chief LaBeouf and Captain Michael Welch, who took the defendant to an interview room. LaBeouf informed the defendant that the car he had reported stolen had previously been reported stolen, and that the police wanted to clear up the matter. LaBeouf said it was standard policy to advise persons of their rights prior to questioning, and he gave the defendant an oral Miranda advisement. See Miranda v. Arizona, 384 U.S. 436 (1966). The defendant said he understood his rights and was willing to talk to the officers.

The officers asked the defendant to describe the route he had travelled from California to New Hampshire. The defendant responded that three weeks earlier he left Costa Mesa,

California with a woman named Julie. The two drove up the West Coast through Oregon and Washington into Canada. They proceeded east across Canada to Montreal. When they reached Montreal, Julie flew back to California. In Montreal the defendant met a man named Steve whose last name was either Corbitt or Carlton. The two men drove south to New Hampshire and stopped at the Holiday Inn in Manchester. It was there that "Steve" stole the defendant's car and personal belongings.

At this point in the interview, LaBeouf told the defendant that an Angel Santiago had been shot to death in Colorado, and that the defendant had registered at the Holiday Inn using a credit card bearing the name of Santiago. LaBeouf then asked the defendant to start over again beginning with his correct name. The defendant paused for a moment, stared at the officers, and said his real name was Nicholas Jones. He stated that he was an escapee from an Alabama prison where he had been serving a sentence for auto theft.

The defendant then gave a second account of his travels. He told the officers that he hitchhiked east out of Las Vegas, Nevada, and obtained a ride from a man named George between August 16 and August 19 in Utah. Several hours after picking the defendant up, the man said that he was going to give his car to the defendant and hitchhike back to California. The man said he would report the car as stolen a few weeks later. The defendant accepted the car and drove across country, eventually stopping in Montreal, where he met "Steve."

The interview lasted from 7:35 a.m. to 9:45 a.m. On the basis of the defendant's admission that he was an escapee from prison, he was arrested and incarcerated as a fugitive from justice.

The defendant was subsequently charged in the Mesa County District Court with the first-degree murder and aggravated robbery of Angel Santiago. At trial the prosecution called James Cooper, who testified that he met the defendant in Las Vegas in August 1979. Cooper said that the defendant stayed with him for several days and then departed without saying where he was going. Cooper also testified that he owned a .22 caliber "Bicentennial Edition" Ruger handgun which he discovered missing shortly after the defendant left.

The evidence at trial also established that two days after the defendant's arrest in New Hampshire, police officers in Maine discovered Angel Santiago's car in the possession of and recently registered to Douglas Copley, who had obtained different license plates. Copley was subsequently identified as the man who checked into the Manchester Holiday Inn with the defendant. Copley led the officers to a handgun, which he had taken from the car and buried several miles from his home. At trial James Cooper identified the weapon as his .22 caliber Ruger handgun. A ballistics expert testified that two of the three shell casings found in the vicinity of Santiago's body were fired in Cooper's gun.

Other evidence against the defendant included the discovery of personal items belonging to Santiago in the defendant's room at the Manchester Holiday Inn. Objects belonging to Santiago were also found in a dumpster in Iowa. A fingerprint lifted from a cigarette carton in the dumpster was identified as the defendant's.

II.

Prior to trial, the defendant filed a motion to suppress the statements he made to the Manchester police. At the suppression hearing, the defendant argued that the Miranda advisement given to him was insufficient because the officers did not inform him that he was suspected of criminal activity. The trial court denied the motion after finding that the defendant was properly advised of his rights, and that he voluntarily agreed to talk to the police officers.[4]

The court of appeals reversed the trial court's denial of the motion to suppress. The court stated:

> Here, defendant was questioned by New Hampshire police after reporting the theft of his automobile. The questions asked by the policemen concerned the registration number and vehicle identification number of the automobile. According to New Hampshire authorities, Miranda warnings were given prior to this questioning as a matter of course. After double checking the information given them by defendant in response to their questions, the investigators had reason to believe defendant had participated in a homicide which occurred in Mesa County, Colorado. Before questioning defendant regarding the Colorado homicide, however, no further advisements were given.

People v. Jones, 677 P.2d at 383. Relying on People v. Spring, 621 P.2d 965 (Colo. App. 1983), the court held that since the defendant was not advised that he was a suspect in the Colorado homicide, the waiver of his Miranda rights was invalid.

A.

Statements made by a defendant during custodial interrogation are admissible only if the prosecution establishes that the defendant was warned of his right to remain silent and his right to counsel prior to any questioning. Miranda v. Arizona, 384 U.S. 436 (1966); People v. Spring, Nos. 83SC145 & 83SC155 (Colo. Dec. 2, 1985). The prosecution must also show that the defendant voluntarily, knowingly, and intelligently waived his Miranda rights. Id. If the defendant's statements were preceded by an adequate Miranda advisement and a valid waiver, a third condition of admissibility is that the statements were voluntary. People v. Pierson, 670 P.2d 770 (Colo. 1983); People v. Fish, 660 P.2d 505 (Colo. 1983).

In this case, a threshold issue is whether the defendant, at the time of making the statements to the Manchester police, was in custody. The trial court made no specific findings on the custody issue, stating only that until the defendant admitted he was an escapee from an Alabama prison, he was not under arrest. The court of appeals also failed to address the issue. In its brief to this court, the prosecution asserts

that the defendant was not in custody at the time he made the statements. Therefore, the prosecution contends the defendant's statements are admissible regardless of the adequacy of the Miranda warnings and the validity of the waiver.

In determining whether a person is in custody, the question is whether a reasonable person in the suspect's position would consider himself significantly deprived of his liberty. People v. Black, 698 P.2d 766 (Colo. 1985); People v. Thiret, 685 P.2d 193 (Colo. 1984). A court must consider the totality of circumstances under which the questioning was conducted, including:

> [T]he time, place and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

People v. Thiret, 685 P.2d at 203. A person may be deemed "in custody" even if he has not been formally arrested by the police. See People v. Johnson, 671 P.2d 958 (Colo. 1983). However, simply because questioning occurs at the police station does not mean that custodial interrogation has occurred. Oregon v. Mathiason, 429 U.S. 492 (1977); People v. Johnson, 671 P.2d at 958.

Here, two police officers were instructed to bring the defendant into the police station for further questioning regarding the stolen automobile. The officers arrived at the defendant's hotel room at approximately 7:00 a.m. When they received no response to their knocking on the door, the officers summoned a hotel employee to open the door. The officers awakened the defendant and requested that he accompany them to the police station. Though the officers did not arrest the defendant, they did not tell him that he was free to decline their request. The officers led the defendant to their patrol car, and one sat in the back seat next to the defendant while the other drove the car to the station. At the stationhouse, the defendant was taken to an eight-by-eight foot interrogation room, given Miranda warnings, and questioned by two officers for two hours and ten minutes. There is no indication in the record that the officers ever told the defendant that he was free to leave. Only fifteen minutes after the interview began, the officers suggested to the defendant that the story he was telling them was a lie and that he should begin again. Under these circumstances, we believe that a reasonable person in the defendant's position would have considered himself significantly deprived of his liberty. Therefore, the defendant's statements to the Manchester police were the product of custodial interrogation.

B.

We must next determine whether the defendant's statements were preceded by adequate warnings and a valid waiver. The trial court found that the defendant was fully apprised of his rights, and the court's finding has not been contested on appeal. The trial court also found that the defendant voluntarily agreed to talk to the police officers. The court of appeals reversed, holding that because the defendant was not advised that he was a suspect in the Santiago homicide, the waiver of his Miranda rights was invalid. The court relied on People v. Spring, 621 P.2d at 965. In Spring, agents of the Federal Bureau of Alcohol, Tobacco and Firearms arrested Spring in Kansas City, Missouri on charges of firearms violations. Prior to arresting Spring, the agents learned from an informant that Spring had admitted participating in a homicide in Colorado. The agents initially questioned Spring on the firearms charges but then asked him whether he had a criminal record. Spring said that he shot his aunt when he was ten years old and that he had a juvenile murder record. Asked if he had ever shot anyone else, Spring said "I shot another guy once." Upon further questioning, Spring denied ever having killed a man in Colorado.

When Spring was subsequently charged in the Colorado homicide, he moved to suppress his responses to the questions unrelated to the firearms charges. The trial court denied the

motion, but the court of appeals reversed. The court held that the failure of the agents to inform Spring that he would be questioned about the Colorado homicide rendered the waiver of his Miranda rights invalid as to the questioning about the homicide.

We granted certiorari and affirmed the decision of the court of appeals to suppress the statements. However, we rejected the absolute rule adopted by the court of appeals, holding that "[w]hether, and to what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances, although it may be a major or even a determinative factor in some situations." People v. Spring, Nos. 83SC145 & 83SC155, slip. op at 14 (Colo. Dec. 2, 1985) (citations omitted). We noted that a suspect's awareness of the subject matter of the questioning may come from sources other than the interrogating officers. Under the facts in Spring, we concluded that the failure of the federal agents to inform Spring that part of the questioning would focus on the Colorado homicide and the absence of any basis upon which Spring could have reasonably suspected that he was being interrogated on that matter constituted a sufficient basis for holding the waiver invalid. We said:

> Spring had no reason to suspect that the federal agent who had just arrested him in Kansas City

> during a firearms transaction that allegedly violated federal law would question him about a murder that occurred in Colorado, a crime not only in a distant jurisdiction but also outside of the normal purview of the federal Bureau of Alcohol, Tobacco and Firearms and totally unrelated to the transaction that gave rise to the arrest and interrogation.

Slip op. at 18.

The court of appeals in Spring and in this case erroneously concluded that since the defendant was not told at the time he waived his Miranda rights that the interview would include questions about the homicide under investigation, the waiver was necessarily invalid. As we said in Spring, the applicable standard for determining the validity of the waiver is whether, in view of the totality of the circumstances, the waiver was voluntary, knowing, and intelligent. No single factor is determinative.

The defendant here reported to the Manchester police that his car had been stolen. In their investigation, the police learned that the car had previously been reported stolen and that its owner was the victim of a homicide. The police naturally desired to question the defendant about his claim of ownership to the vehicle and the circumstances surrounding his possession of the vehicle. The defendant was informed that the police wanted to clear up the confusion about the stolen car, and the defendant's acquisition and use of the car was in fact the subject of the interview. When the defendant's first account of his travels did not clarify the information known to

the police, they told the defendant that an Angel Santiago had been killed and that the defendant was using a credit card bearing that name. The defendant then gave a second version of his travels in which he stated he acquired the car from "George" while hitchhiking in Utah.

This is unlike the factual scenario in Spring. The federal agents in Spring began questioning the defendant about firearms charges and then asked about an unrelated homicide. In this case, the Manchester police questioned the defendant about his claim that his car was stolen and that he was Angel Santiago. Questioning about the car necessarily involved the subject of the Santiago homicide, which was part of the same criminal episode involving possession of a stolen automobile owned by Angel Santiago. While the defendant in Spring had no reason to believe that the federal agents who questioned him about federal charges would also inquire about a Colorado homicide, the defendant here could have reasonably expected to be asked about the circumstances surrounding his ownership and possession of the car he had reported stolen. In our view, the defendant was adequately advised of the subject matter of the interview at the time he waived his Miranda rights.

An examination of the other circumstances surrounding the interview demonstrates that the defendant voluntarily, knowingly, and intelligently waived his constitutional rights. Before the interview the defendant was calm and friendly. He

was not threatened or coerced. After being advised of his rights, the defendant said that he understood his rights and was willing to talk to the police. The record contains ample evidence that the defendant was sufficiently intelligent to understand the nature of his rights and the consequences of waiving them. We therefore conclude that the defendant's waiver of his rights was voluntary, knowing, and intelligent.

C.

We turn finally to the trial court's findings that the defendant's statements were voluntary. We will not disturb a trial court's findings of fact on voluntariness if the findings are supported by adequate evidence in the record. People v. Pierson, 670 P.2d at 770. Here, there is no evidence that the statements were obtained through promises, threats, violence, or any other improper influence. People v. Cummings, 706 P.2d 766 (Colo. 1985). On the contrary, the record reveals that the defendant spoke to the officers freely and without reservation.

Accordingly, the court of appeals erred in ordering suppression of the statements made by the defendant to the Manchester police. The statements were voluntary and were made only after a proper Miranda advisement and waiver.

II.

At the close of evidence the defendant requested that the trial court instruct the jury on second-degree murder. The court rejected the tendered instruction and submitted the case

to the jury on first-degree murder and aggravated robbery. The court of appeals reversed, declaring that "[a]lthough the evidence in this case indicates that there was little validity to defendant's contentions which would reduce his degree of culpability in the homicide, the [trial] court, nevertheless, had a duty to instruct the jury on this lesser offense." 677 P.2d at 385. The prosecution asserts that the trial court properly refused the instruction on second-degree murder because there was no evidence to support the instruction. We agree.

In a homicide case, a defendant is entitled to an instruction on a lesser included offense if there is any evidence, however slight, to establish the lesser included offense. People v. Shaw, 646 P.2d 375 (Colo. 1982); Coston v. People, 633 P.2d 470 (1981). Even if the evidence offered on behalf of the defendant is unpersuasive, the trial court is under a duty to instruct on the lesser offense. Id. However, where there is no evidence to support the instruction, refusal to instruct on the lesser offense is not error. Coston, 633 P.2d at 470.

Section 18-3-103(1)(a), 8 C.R.S. (1978), provides that a person commits the crime of second-degree murder if "[h]e causes the death of a person knowingly, but not after deliberation." Id. The defendant did not present any evidence at trial which would permit the jury to find that he caused the

death of Angel Santiago knowingly but not after deliberation, and we find none in the record.[5] The defendant's theory of defense was that he did not commit the homicide.[6] Because there is no evidence in the record to support the second-degree murder instruction tendered by the defendant, the trial court properly denied the instruction.

III.

The court of appeals also held that the trial court erred in failing to sequester the jury. The prosecution contends that although the jury should have been sequestered under Crim. P. 24(f), the defendant waived the requirement and has failed to establish any prejudice resulting from the trial court's failure to sequester the jury. We agree.

At the time of trial, Crim. P. 24(f) provided:

> (f) Custody of Jury
> In noncapital cases jurors may be permitted to separate during all trial recesses after cautionary instructions by the court as to their conduct. After the case has been submitted to the jury for deliberation, and they have not been able to arrive at a verdict at a reasonable evening hour, they may be permitted to return to their homes to resume deliberations the next day at an hour appointed by the court. Continuous custody of the jury by the bailiff in noncapital cases shall only be upon express order of the court for good cause. In capital cases, however, jurors shall remain in the bailiff's custody during all recesses from the time the jury is selected until discharged by the court.

Id. (emphasis added). A first-degree murder case is a capital case for purposes of Crim. P. 24(f). People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983); Tribe v. District

Court, 197 Colo. 433, 593 P.2d 1369 (1979). Rule 24(f), therefore, requires sequestration of the jury in a first-degree murder case, unless the requirement is waived by the defendant. Tribe v. District Court, 192 Colo. at 433, 593 P.2d at 1369; Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

The court of appeals did not consider whether the defendant waived sequestration of the jury, stating only that Faulk, 667 P.2d at 1384, was "dispositive" of the sequestration issue. In Faulk, a first-degree murder case, both the defendant and the district attorney requested that the jury be sequestered. The trial court denied the request on the ground that sequestration was unnecessary because the jury was not death qualified. Relying on Tribe v. District Court, 197 Colo. at 433, 593 P.2d at 1369, we held that Crim. P. 24(f) requires sequestration of the jury in a first-degree murder case, regardless of whether the prosecution intends to qualify the jury for consideration of the death penalty or to seek the death penalty in the event of conviction. However, we explicitly recognized, as we had in Tribe, that a defendant may waive sequestration. We had no occasion in Faulk or Tribe to address the waiver issue because the defendants in both cases moved to sequester the jury.

By contrast, the defendant here did not request sequestration, did not object to the trial court's decision to allow separation, and did not complain when the jury separated on a number of occasions. The first time the defendant raised

the issue of sequestration was in his motion for a new trial. We are thus squarely confronted with the question of whether the defendant's silent acquiescence to the separation of the jury constituted a waiver of the sequestration requirement.

In Segura v. People, 159 Colo. at 371, 412 P.2d at 227, a first-degree murder case, defense counsel agreed with the prosecutor that sequestration of the jury was unnecessary. The trial court permitted separation after giving admonitory instructions to the jury. The defendant was convicted. On appeal, he contended that the requirement of sequestration in capital cases could not be waived. We held that "where defense counsel expressly agrees to separation of the jury in a capital case, error cannot be predicated on that procedure in the absence of a showing of prejudice to the defendant." Id. at 377, 412 P.2d at 231.

Unlike the defendant in Segura, the defendant here did not expressly consent to separation of the jury. However, we believe that the defendant's failure to object to the separation during trial constituted a waiver of sequestration. The majority of courts hold that sequestration may be waived by reason of the defendant's failure to make a timely request or objection. See, e.g., State v. Magwood, 290 Md. 615, 432 A.2d 446 (1981); Walters v. State, 554 P.2d 862 (Okla. Crim. App. 1976); Jackson v. State, 229 Ga. 191, 190 S.E.2d 530 (1972), vacated on other grounds, 409 U.S. 1122 (1973); Flannery v.

Commonwealth, 443 S.W.2d 638 (Ky. 1969); Annot., 72 A.L.R.3d 131, 180-186 (1976). The rationale underlying these cases is that a defendant should not be permitted to remain silent at trial while the jury is allowed to separate and then object to separation for the first time in his motion for a new trial. We agree with the rationale and hold that in the absence of a timely objection the failure to sequester the jury in a capital case is not reversible error unless the defendant establishes prejudice arising out of the separation of the jury.

Here, the trial court found, after a lengthy hearing on the defendant's motion for a new trial, that the defendant was not prejudiced by the separation of the jury. We will not disturb the trial court's finding since it is supported by adequate evidence in the record. It therefore follows that the trial court's failure to sequester the jury does not constitute reversible error.

IV.

On the morning of trial, the defendant moved for dismissal of the charges on the ground that he had been denied a speedy trial. The trial court denied the motion. The court of appeals affirmed.

The defendant entered pleas of not guilty to first-degree murder and aggravated robbery on March 3, 1980. A jury trial was set for July 28, 1980. On July 3, 1980, the defendant's attorney filed a motion to suspend proceedings pending a

competency examination of the defendant at the Colorado State Hospital. The trial court denied the motion. The same day defendant successfully petitioned this court for a rule to show cause and a stay of pending proceedings. On September 29, 1980, we made the rule absolute and returned the case to the trial court with directions to order a competency examination. Jones v. District Court, 617 P.2d 803 (Colo. 1980). The trial court thereupon ordered the defendant taken to the Colorado State Hospital for examination. On November 6, 1980, the psychiatric report was filed in the trial court. The first day after receipt of the report that defense counsel could be present in court was November 14. On that date, the trial court determined that the defendant was competent to proceed. Trial was set for and in fact commenced on January 12, 1981.

A criminal defendant must be brought to trial within six months from the date he enters a plea of not guilty. § 16-1-405, 8 C.R.S. (1978 & 1985 Supp.); Crim. P. 48(b). Failure to comply with the speedy trial statute requires dismissal of the charges against the defendant. People v. Bell, 669 P.2d 1381 (Colo. 1983); Harrington v. District Court, 192 Colo. 351, 559 P.2d 225 (1977). However, certain periods of time are not included in the computation of the six month period. Two exclusions are pertinent here:

> (6)(b) The period of delay caused by an interlocutory appeal whether commenced by the defendant or by the prosecution;
>
> . . . .

(f) The period of any delay caused at the instance of the defendant.

§§ 18-1-405(6)(b) & (f).

The defendant concedes that the eighty-nine day period between July 3 and September 30 must be excluded from the speedy trial computation as a "period of delay caused by an interlocutory appeal." § 18-1-405(6)(b); see People v. Ferguson, 653 P.2d 725 (Colo. 1982) (original proceeding initiated in good faith by either the defense or the prosecution constitutes an "interlocutory appeal" for purposes of the speedy trial statute). However, the defendant asserts that the period between October 1 and November 14 cannot be excluded. We disagree.

In our view, the thirty-seven day period between October 1 and November 6 was a period of delay "caused at the instance of the defendant." § 18-1-405(6)(f). We stated in People v. Bell, 669 P.2d 1381 (Colo. 1983), that "[t]he key to interpreting category (6)(f) is to determine whether the defendant caused the delay. If the delay is caused by, agreed to, or created at the instance of the defendant, it will be excluded from the speedy-trial calculation made by the court." Id. at 1384. See also People v. Murphy, 183 Colo. 106, 515 P.2d 107 (1973) (in making speedy trial determination, delays at the request of or for the benefit of the defendant are chargeable to the defendant). Here, the competency examination was requested by defense counsel for the benefit of the

defendant. The time necessary to complete the examination was thus properly chargeable to the defendant. See ABA Standards for Criminal Justice (1982) § 12-2.3(a) (period of delay resulting from examination and hearing on defendant's competency should be excluded from speedy trial computation).

We also believe the eight-day delay between the receipt of the psychiatric report on November 6 and the competency hearing on November 14 was attributable to the defendant. November 14 was the first day after receipt of the report that the defendant's attorney could be present in court. Scheduling delays to accommodate defense counsel are chargeable to the defendant. People v. Bell, 669 P.2d at 1381.

In view of the foregoing analysis, the defendant was not denied his right to a speedy trial. The defendant entered pleas of not guilty on March 3, 1980. Therefore, the original speedy trial deadline was September 3. Adding to that date the eighty-nine day delay occasioned by the original proceeding, the thirty-seven day delay necessary for the competency examination, and the eight-day scheduling delay to accommodate defense counsel, the new speedy trial deadline was January 15, 1981. The defendant's trial began on January 12, 1981.

V.

The judgment of the court of appeals is reversed, and the case is remanded to the court of appeals with directions to reinstate the judgment of conviction against the defendant.

1
§ 18-3-102, 8 C.R.S. (1978).

2
§ 18-4-302, 8 C.R.S. (1978).

3
Both the prosecution and the defendant filed petitions for certiorari. We granted both petitions, and the two cases were consolidated for purposes of this opinion.

4
Specifically, the trial court found:

> [T]he evidence clearly indicates that the defendant was fully apprised of his rights, that the focus of the investigation had not centered upon the defendant, and that as a matter of fact, since the very beginning of the transaction, the night before when the defendant had approached the officer voluntarily to tell the officer that his automobile had been stolen and that he was reasonably sure that whoever stole it wasn't going to bring it back, and he had been deprived of his trousers and wallet and other indicia of identification. The reference to the registration card indicated that the defendant was utilizing the name of Santiago, and there was also an indication there that he had employed a VISA card, so when they started looking for the automobile, they found out that it was involved in some criminal activity, possibly theft, and possibly homicide, but the officers were faced with a situation in which they were trying to apprehend the thief of the defendant's car and trying to get all of the information they could about the car, and in the process of doing so, they discovered that it was on the National Identification Computer, and that there was some criminal involvement other than that disclosed by theft; in the interrogation, the first story that he gave was inconsistent with the one that he gave secondly when they discovered or told him that they did not think that he was Santiago, and what was his name, and he gave them another statement and another name, and he did all of this voluntarily. Now, there was no probable cause to arrest, and there was no arrest which occurred prior to the time that the defendant admitted that he was an escapee from the Alabama

> institution. At that time, he became amenable to arrest for that charge, and he was booked by the New Hampshire Police Department on that charge. He was not charged with a homicide, and there was no probable cause to arrest for homicide, and there was no probable cause to arrest for thievery in the light of the stories related to the police officers by the defendant. Those are the findings of fact that will be attributed specifically to the order of the court overruling the motions contained in the motion to suppress statements in number one.

5
> Indeed, the defendant did not call any witnesses and did not present any evidence at trial.

6
> Although the defendant did not present any evidence at trial, his theory of the case may be gleaned from his cross-examination of prosecution witnesses. Additionally, the following colloquy took place between the defendant and the trial court at the close of the prosecution's case:
>
> THE COURT: Your only defense is that you are not guilty; that you didn't do it.
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: That is what you have stated is your defense. The People have charged in the information alleging a robbery and murder and you have denied that you participated in either one of them.
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: That is your defense?
>
> THE DEFENDANT: Yes, your Honor.

7
Crim. P. 24(f) has since been amended (effective January 1, 1984). The new rule provides:

> (f) Custody of Jury.

(1) In all cases, in the court's discretion, jurors may be sequestered or permitted to separate during all trial recesses, both before and after the case has been submitted to the jury for deliberation. Cautionary instructions as to their conduct during all recesses shall be give to the jurors by the court.

(2) The jurors shall be in the custody of the bailiff whenever they are deliberating and at any other time as ordered by the court.

(3) If the jurors are permitted to separate during any recess of the court, the court shall order them to return at a day and hour appointed by the court for the purpose of continuing the trial, or for resuming their deliberations if the case has been submitted to the jury.